

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AECON BUILDINGS, INC., F/K/A/ BFC
FRONTIER, INC., a Washington corporation,

Plaintiff,

v.

ZURICH NORTH AMERICA, et al.,

Defendants.

CASE NO. C07-832-MJP

ORDER ON DEFENDANTS'
MOTION FOR APPLICATION
OF OREGON LAW

This matter comes before the Court on defendant Zurich North America's motion on behalf of all defendants for application of Oregon law. Having considered Defendants' motion, reply, exhibits, and declarations (Dkt. Nos. 29-31, & 34), Aecon Buildings, Inc.'s response and declaration (Dkt. No. 32), the amended complaint (Dkt. No. 24), oral argument of March 18, 2008, and the balance of the record, the Court DENIES Defendants' motion.

Background

Aecon Buildings, Inc. ("Aecon") is the successor-in-interest of BFC Frontier, Inc., a Washington corporation that was the general contractor for a casino and hotel project for the Quinault Indian Nation in Ocean Shores, Washington. (McGillis Decl., Dkt. No. 32-2 at ¶ 2.) For purposes of this Order, the Court refers to Aecon only, though BFC Frontier, Inc. was the operative entity during the initial work on the project. Construction of the hotel and casino began in 1998 and was substantially complete in June, 2000. (First Amend. Compl., Dkt. No. 24, at 5.) Aecon hired Western Partitions, Inc. ("Western Partitions") as a subcontractor to install all interior and exterior metal framing, gypsum board assemblies, and shaft wall assemblies. (McGillis Decl. Ex. 2.) Aecon

1 and Western Partitions signed a subcontract wherein Western Partitions agreed to name Aecon as an
2 additional insured to its comprehensive general liability insurance policy. (McGillis Decl. Ex. 2 at 24.)

3 After completion of the project, the Quinault Indian Nation found defects in the construction
4 and notified Aecon. (First Amend. Compl. at 5.) During mediation in Washington with the Quinault
5 Indian Nation, Aecon realized that it could incur liability as a result of the work performed by
6 Western Partitions. Aecon settled the Quinault Indian Nation's claims for \$3,750,000. (Dkt. No. 42
7 at 2-3.) It tendered a request for indemnification to Western Partition's insurers, the named
8 defendants to this case. (First Amend. Compl. at 6.) Defendants have not accepted this tender or
9 agreed to indemnify Aecon. (Id.) Aecon alleges that Defendants have failed to respond to its
10 requests. (Id.)

11 Aecon has made four claims against Defendants: (1) Breach of contract; (2) Breach of
12 Defendants' obligation of good faith and fair dealing actionable under the Consumer Protection Act;
13 (3) Negligent investigation; and (4) Bad faith breach of the duty to defend requiring coverage by
14 estoppel. (First Amend. Compl. at 6-7.) Aecon seeks declaratory relief and damages, including treble
15 damages. (Id.)

16 Defendants collectively filed this motion seeking application of Oregon law. (Dkt. No. 29.)
17 Aecon filed its Response, objecting to application of Oregon law and insisting that Washington law
18 should apply. (Dkt. No. 32.) Defendants filed a Reply. (Dkt. No. 34.) Aecon filed a supplemental
19 declaration on March 14, 2008. (Dkt. No. 44.) Defendants moved to strike the declaration the same
20 day. (Dkt. No. 45.)

21 Discussion

22 I. Motion to Strike

23 Aecon submitted a supplemental declaration four days before oral argument on Defendants'
24 choice of law motion. (Dkt. No. 44.) The declaration contains the contract entered into between
25 Aecon and the Quinault Indian Nation for the hotel and casino project. (Id.) Defendants move to
26 strike the supplemental declaration, stating that it was late-filed. Aecon admitted at oral argument
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1 that it should have asked leave of the Court to file the declaration, but asked the Court to accept it
2 in the interest of justice.

3 Generally, all documents related to a motion must be received by the noting date. See CR
4 7(b) (reply papers must be received no later than the noting date). The noting date for Defendants’
5 motion was February 22, 2008. The supplemental declaration is nearly three weeks late. Though
6 there are exceptions to this rule, none are applicable. See CR 7(d)(1)-(2). Even if the Court
7 construes the supplemental declaration as a surreply, it was filed well beyond the 5 day period in
8 which a surreply may be filed. CR 7(g)(2). The Court GRANTS Defendants’ motion to strike and
9 will not consider Aecon’s supplemental declaration.

10 **II. Conflict of Law Analysis**

11 In a suit brought under the Court’s diversity jurisdiction, the Court must determine whether
12 to apply the law of the forum, Washington law, or the law of another state. See Kohlrautz v. Oilmen
13 Participation Corp., 441 F.3d 827, 833 (9th Cir. 2006). To make this determination, the Court
14 applies Washington’s choice of law rules. See id. Washington’s law presumptively applies. See
15 Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 692 (2007). Upon motion by a party, the Court
16 engages in a two-step inquiry to determine if another forum’s law should apply. See id. First, the
17 Court must be persuaded by the moving party that there is an actual conflict between the laws and
18 interests of Washington and the laws and interest of the other relevant forum in order not to apply
19 Washington law. See id. “If the result for a particular issue ‘is different under the law of the two
20 states,’” there is actual conflict. Id. (quoting Seizer v. Sessions, 132 Wn.2d 642, 648 (1997)).
21 However, if the laws and interest of the concerned states do not conflict, “the situation presents ‘a
22 “false” conflict’ and ‘the presumptive local law is applied.’” Id. (quoting Seizer, 132 Wn.2d at 648-
23 49). Second, if there is actual conflict, the Court must determine which state has the “most significant
24 relationship” to the action. See id. Washington relies on the Restatement (Second) of Conflict of
25 Laws (1971) (“Restatement”) to guide this analysis. Id. at 693.

26 In this case, there is actual conflict between Oregon and Washington law in regards to two
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1 of Aecon's claims. Defendants did not present any argument that there is a conflict in regards to
2 Aecon's negligent investigation and breach of contract claims. Washington law applies to these
3 claims. See Erwin, 161 Wn.2d at 692 (Washington law applies in the absence of actual conflict).
4 Regarding the remaining claims, actual conflict exists and because Washington has the most
5 significant relationship to the claims Washington law applies.

6 **A. Actual Conflict**

7 Defendants contend that there is an actual conflict between Washington and Oregon law as
8 to Aecon's claims for breach of Defendants' obligation of good faith and fair dealing actionable under
9 the Consumer Protection Act ("CPA") and for coverage by estoppel due to a bad faith breach of the
10 duty to defend.

11 **i. The CPA and Oregon's Consumer Unfair Trade Practices Act**

12 Defendants claim that whereas Washington's insurance regulations are actionable by citizens
13 under the CPA (RCW 19.86), private citizens cannot enforce Oregon's insurance regulations under
14 Oregon's CPA corollary, the Unlawful Trade Practices Act (See ORS § 646.638). Aecon responds
15 that there are no conflicts because Aecon could privately enforce Oregon's insurance laws through
16 the tort of wrongful interference with a business relationship.

17 An actual conflict exists between Washington and Oregon law in regards to Aecon's CPA
18 claim. In Washington, an insured "may bring a private action against their insurers for breach of duty
19 of good faith under the CPA." Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 394 (1986).
20 "[A] breach of an insurer's duty of good faith [as defined by state law] constitutes a per se CPA
21 violation." Id. However, the Oregon Unfair Trade Practices Act does not apply to insurance and
22 cannot be used as a private right of action to enforce Oregon's insurance laws. See ORS §§ 646.638
23 & 646.605(6) (excluding insurance-related matters from the Act). Although Aecon could seek to
24 enforce a violation of Oregon's insurance regulations through a claim for negligent interference with
25 a business relationship, it would face substantially different burdens of proof. In Washington it need
26 only show breach of the insurance laws and regulations to show a per se violation of the CPA. Tank,

1 105 Wn.2d at 394. However, in Oregon, Aecon would have to prove: “(1) the existence of a
 2 professional or business relationship; (2) intentional interference with that relationship; (3) by a third
 3 party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect
 4 between the interference and damage to the economic relations; and (6) damages.” NW Natural Gas
 5 Co. v. Chase Gardens, Inc., 328 Or. 487, 497 (1999) (citations omitted). Because the burden on
 6 Aecon in Oregon is higher than in Washington, the outcome of Aecon’s claim could change based
 7 on the law applied. Thus, there is actual conflict. See Erwin, 161 Wn.2d at 692.

8 The Court finds actual conflict regarding Aecon’s CPA claim, including Aecon’s request for
 9 treble damages under the CPA.¹

10 **ii. Bad Faith Breach of the Duty to Defend Requiring Coverage by**
 11 **Estoppel**

12 Defendants contend that coverage by estoppel due to bad faith breach of the duty to defend
 13 is only actionable in Washington, and that this produces an actual conflict. Aecon responds that
 14 coverage by estoppel is an action in tort and Defendants’ attempt to create conflict by citing to
 15 Oregon’s contract law is erroneous. Washington permits this type of coverage by estoppel claim,
 16 whereas Oregon does not. An actual conflict exists.

17 Defendants claim that Aecon can obtain coverage by estoppel for “wrongful denial of defense”
 18 under Washington law, but not under Oregon law. Aecon’s estoppel claim derives from Kirk v. Mt.
 19 Airy Ins. Co., which established that a party may obtain insurance coverage by estoppel upon a

21 ¹ Defendants have argued that there is a conflict between Washington and Oregon law
 22 because “Aecon seeks punitive damages under the CPA.” (Defs’ Mot. for App. of Or. Law, Dkt. No.
 23 29, at 6.) The Court’s finding of actual conflict regarding Aecon’s cause of action under the CPA
 24 renders this argument superfluous. However, the Court notes that Washington has abolished punitive
 25 damages, see Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45 (1891), except when authorized by
 26 statute, see Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wn.2d 692, 699 (1981) (citing the CPA
 27 as an exception). Though treble damages under the CPA may be punitive in nature, they provide only
 a trebling of actual damages, unlike classic punitive damages. To the extent that Aecon may recover
 only treble damages in Washington, but full punitive damages in Oregon, there is actual conflict
 regarding the damages recoverable. See Erwin, 161 Wn.2d at 692.

1 showing of an insurer's bad faith breach of the duty to defend. 134 Wn.2d 558, 562-63 (1998).
2 Defendants contend that there is no similar cause of action in Oregon, because breach of contract only
3 permits recovery of contract damages. See Timberline Equip. Co., Inc. v. St. Paul Fire & Marine Ins.
4 Co., 281 Or. 639, 646 (1978). Aecon responds that Defendants confuse tort law with contract law.
5 Defendants clarified in oral argument that this is a hybrid, a "con-tort," a claim sitting at the
6 intersection of contract and tort law. Regardless, as Aecon acknowledges, there is no similar cause
7 of action available in Oregon. (See Aecon Mot. in Opp. to Or. Law at 6.) While a plaintiff may claim
8 coverage by estoppel, it cannot be based on a breach of the duty to defend and the burden on the
9 plaintiff is substantially different. See Richardson v. Guardian Life Ins. Co. of Am., 161 Or. App.
10 615, 626 (1999) (setting out the elements of coverage by estoppel). Because Aecon's claim for
11 coverage by estoppel under Oregon would likely produce a different outcome than if brought under
12 Washington law, there is actual conflict. See Erwin, 161 Wn.2d at 692.

13 **B. Most Significant Relationship**

14 The application of the Restatement to Aecon's claims where actual conflict exists
15 demonstrates that Washington law should apply. The parties contend that Restatement section 188
16 applies to Aecon's CPA and bad faith breach of the duty to defend claims. The Court only partially
17 agrees. Washington applies the Restatement's general tort conflict of law principles to CPA claims.
18 See Schnall v. AT&T Wireless Servs., Inc., 139 Wn. App. 280, 292-94 (2007). The Court will apply
19 Restatement section 145 to determine the law applicable to Aecon's CPA claim. As Defendants
20 contended at oral argument, Aecon's bad faith breach of the duty to defend claim sounds in both tort
21 and contract law (a "con-tort"). In the absence of a specific Restatement section covering this type
22 of con-tort, the Court will consider both Restatement sections 145 (tort) and 188 (contract).

23 **i. CPA Claim**

24 The Court analyzes Restatement section 145 to determine the most significant relationship
25 in regards to Aecon's CPA claim. See id. This Restatement section applies to tort claims and sets
26 forth four relevant contacts to consider:

- 1 (a) the place where the injury occurred,
- 2 (b) the place where the conduct causing the injury occurred,
- 3 (c) the domicile [sic], residence, nationality, place of incorporation and place of business of the parties, and
- 4 (d) the place where the relationship, if any, between the parties is centered.

5 The Court must evaluate the contacts “according to their relative importance with respect to the particular issue.” Id. The Court must not simply count contacts to the relevant states, but determine which contacts are the most significant. See Johnson v. Spider Staging Corp., 87 Wn.2d 577, 581 (1976).

8 The relevant contacts related to Aecon’s CPA claim weigh heavily in favor of application of Washington law. Washington is the location of the injury—the settlement owed by Aecon to the Quinault Indian Nation for work performed, in part, by Western Partitions. See Restatement § 145(2)(a). Defendants’ alleged violation of Washington’s insurance regulations and its obligation of good faith and fair dealing also occurred in Washington. See id. § 145(2)(b). Aecon is a Washington corporation and Defendants are New York, Delaware, and Maryland companies. Id. § 145(2)(c). (Dkt. No. 2.) The relationship between the parties centers on Aecon’s relationship with Western Partitions and the construction project in Washington. Id. § 145(2)(d). Moreover, Washington has a substantial interest in applying its Consumer Protection Act to regulate conduct that may violate Washington’s insurance regulations. See Restatement § 6(2)(b)-(c); Johnson, 87 Wn.2d at 581. The most significant contacts are to Washington and the Court will apply Washington law to Aecon’s CPA claim.

20 **ii. Bad Faith Breach of the Duty to Defend Claim**

21 The Court employs Restatement sections 145 and 188 to determine the state with the most significant relationship to Aecon’s bad faith breach of the duty to defend claim. In considering Restatement section 188, the Court must determine the relevant contract at issue. Aecon argues that the Court should analyze the subcontract, whereas Defendants contend that the insurance policy is the relevant contract. Aecon may only claim a right to indemnity from Defendants by virtue of the insurance policy obtained by Western Partitions from Defendants. Although the subcontract is the

1 agreement that may confer additional insured status to Aecon, it is only from the insurance contract
2 that Aecon may lay any rights to indemnification. The Court analyzes the insurance contract and not
3 the subcontract in its analysis of Restatement section 188.

4 Restatement section 188(2) (contract) sets forth five contacts to consider:

- 5 (a) the place of contracting,
6 (b) the place of negotiation of the contract,
7 (c) the place of performance,
8 (d) the location of the subject matter of the contract, and
9 (e) the domicil [sic], residence, nationality, place of incorporation and place of business of
10 the parties.

11 The five “contacts are to be evaluated according to their relative importance with respect to the
12 particular issue.” Restatement § 188(2). “[T]he protection of the justified expectations of the parties
13 is of considerable importance.” Id. at cmt. b. The Court must consider the interests of the relevant
14 states and determine the most significant contacts. See Johnson, 87 Wn.2d at 581.

15 A consideration of both Restatement sections 145 and 188 convince the Court that
16 Washington law applies to Aecon’s bad faith breach of the duty to defend claim. The injury to Aecon
17 is the denial of coverage and the settlement with the Quinault Tribe, both of which occurred
18 Washington. See Restatement § 145(2)(a). Similarly, the conduct of which Aecon complains is
19 Defendants refusal to provide coverage to Aecon for the Washington settlement. See id. § 145(2)(b).
20 The analysis of the domicile and the relation of the parties is the same as described above and center
21 largely in Washington. See id. § 145(2)(c)-(d). Section 188’s factors point less heavily towards
22 Washington. Oregon is the place of contracting and negotiations of the between Western Partitions
23 and Defendants. See Restatement § 188(2)(a)-(b). Aecon’s request for coverage requires
24 performance of the insurance contract in Washington. See id. § 188(2)(c). Western Partitions’s work
25 in Washington is the subject matter of the insurance contract. See id. § 188(2)(d). The domicile of
26 the parties is the same as above, although the Court also considers Western Partitions’s domicile in
27 Oregon. See id. § 188(2)(d). The Court is unpersuaded that Defendants had any justified expectation
that Oregon law would apply to any request for insurance from an additional insured under the

1 contract. See Restatement § 188 cmt. b. There was no choice of law provision in the contract and
2 Aecon has shown that Western Partitions has performed work in many states. It was foreseeable to
3 Defendants that they may be required to provide insurance to a party made an additional insured by
4 virtue of a contract entered into by Western Partitions outside of Oregon for work performed outside
5 of Oregon. Moreover, Washington has a substantial interest in deterring the bad faith conduct of
6 insurers within the state. See Restatement § 6(2)(b)-(c). Washington has the most significant
7 relationship to this claim.

8 Defendants request that the Court take judicial notice of a complaint and answer in a related
9 case in which Aecon denied that BFI Frontiers, Inc. was Washington corporation. (See Defs' Reply,
10 Dkt. No. 34, at 2.) However, this is not a judicially noticeable fact; these pleadings are not "sources
11 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a). Aecon explained at oral
12 argument that the answer's statement that BFC Frontiers, Inc. was not a Washington corporation was
13 accurate, insofar the corporation no longer existed at the time the pleading was filed. Moreover, the
14 subcontract, that both parties cite as valid, clearly states that BFI Frontiers, Inc. was a Washington
15 corporation. The Court denies Defendants' request to take judicial notice of the pleadings.

16 The Court applies Washington law to all of Aecon's claims.

17 **Conclusion**

18 The Court DENIES Defendants' motion for application of Oregon law. The Court will apply
19 Washington law to Aecon's four claims addressed in this order.

20 The Clerk is directed to send copies of this order to all counsel of record.

21 Dated: March 20, 2008

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23 Marsha J. Pechman
24 U.S. District Judge
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